Supreme Court of Vermont.

STATE OF VERMONT v. THOMAS PATTERSON.

It is not necessary in order to make dying declarations admissible in evidence, that the declarant should state everything constituting the *res gestæ* of the subject of his statement, but only that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact.

When the facts proved on the part of the prosecution show that the respondent claimed to do the act resulting in death to the assailant in self-defence, the burden of proof rests from the first upon the prosecutor to show beyond reasonable doubt that the act was criminal.

It is error for the court to have any communication with the jury after a case has been submitted to them, and while they have it under consideration, except in open court.

It is also error for the court to furnish the jury a copy of the statutes of the state while they are out of court deliberating upon their verdict, that they may read certain provisions, designated by the court, touching the case under consideration.

The idea embraced in the expression that a man's house is his castle, is not that it is his property, and that, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity, is that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant, or members of his family, and in order to accomplish this, the assailant attacks the castle in order to reach the inmate. In this view it is settled that, in such case, the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault.

On exceptions from the County Court of Franklin county. Defendant was indicted for manslaughter. In May, 1871, the prisoner, nineteen years of age, was living with his wife, mother and sister in a tenement house in the village of St. Albans. After he had gone to bed, Flanders and Watson, somewhat intoxicated, went to the house and rapped at the door. Defendant raised a chamber window and asked them what they wanted, and they said they wanted to come in. Talk went on between them, respondent telling them they should not come in, and they insisting that they would, and growing more violent, using abusive epithets and swearing at him, and threatening to smash in the door. He told them if they did not go away they would be made to go—they replying that he could not scare them, and if he would come down they would break in his head—and repeatedly threatening to smash in the door. One of them threw a brick or stone through the window. One started towards the door; whereupon the respondent went to another room and got a gun which was loaded with shot, and put the barrel on

the window-sill and fired, when Watson and Flanders ran away. Flanders died of wounds received from the shot.

The foregoing summary is what in substance the evidence on part of the respondent tended to prove. Respondent testified that he fired to the ground, and his object in firing was not to hit them but to scare them away.

A witness for the prosecution, to prove the dying declarations of Flanders, testified that he saw him after he was shot; that in answer to inquiries, he made statements concerning the occurrence connected with the shooting; that he was so weak that witness could not get a full or detailed statement of the affair from him; that he only got detached statements in the intervals between spells of vomiting; that he took his words on paper at the time to preserve his dying statements, but the paper was lost. To the allowance of this testimony exception was taken. The witness testified that Flanders said that he and Watson went to the front door of the house; he asked for admission to the house; a man opened the window above and asked them what they wanted; they said they wanted to get in; there were some words passed; he didn't let them in and some words passed, and he, Flanders, stepped back to where Watson was, and there was something said about shooting by the party in the house; there was some reply on their part; he didn't undertake to specify what it was; immediately thereafter the gun was discharged; he, Flanders, left then; that is the substance of all he said and very nearly the words he used.

The evidence on both sides was confined to the scene and occurrences in which the homicide took place.

After the jury had retired, they sent the following inquiry in writing to the court from their room by the officer who had them in charge: "What is the law in relation to manslaughter in the third degree, or what is the punishment for manslaughter in the third degree?" and the presiding judge of the court, while the court was in session, and the jury were in their room for deliberation, without the knowledge of the respondent, or his counsel, or the counsel for the state, sent to the jury in the room, and without bringing them into open court, the following communication in writing:

"There are no degrees in manslaughter under our laws; but the amount and kinds of punishment that shall be inflicted you will see is, with certain limitations, in the discretion of the court." And the court sent the General Statutes to the jury in the room and referred them to sect. 15, ch. 112.

This was made the subject of exception.

The foregoing is a sufficient statement to show the grounds of points embraced in the following opinion; though many other points of exception were argued. Respondent was found guilty.

Farrington & Benton, for respondent.

Ballard & Wilson, for the State.

The opinion of the court was delivered by

BARRETT, J.—I. It is objected in behalf of the respondent that the dying declarations of Flanders, as testified by Mr. Hill, should have

been excluded from the consideration of the jury, by force of the rule as stated, 1 Greenl. Ev., § 159, viz: "Whatever the statement may be, it must be complete in itself; for, if the declarations appear to have been intended, by the dying man, to be connected with, and qualified by, other statements, which he is prevented, by any cause, from making, they will not be received." What we understand by the expression, that the statement "must be complete in itself," is not, that the declarant must state everything that constituted the *res gestæ* of the subject of his statement; but that his statement of any given fact should be a full expression of all that he intended to say as conveying his meaning as to such fact. This is plainly indicated by the closing part of the above quotation, as to the declarations made being intended by the dying man to be connected with and *qualified* by other statements, which he is prevented from making. There is no indication in the testimony given by Mr. Hill, that Flanders intended what he said to Hill should be qualified by anything that he wished to say, and was prevented from saying, or did not say. The fact that Mr. Hill had lost the paper containing the declarations in writing, does not bear on the question. It may have some bearing on the weight which ought to be accorded to the evidence thus given, as depending on the accuracy of his recollection, and his correctness in repeating from memory what Flanders said to him. But this, in that respect, is only the common case of comparative reliableness, as between the statement of facts orally from memory, and the statement of them in written memoranda made at the time the facts occurred.

The fact that Flanders made his statement in intervals between vomitings does not touch the question of the competency of the evidence, unless it should appear that, by such vomitings, he was prevented from expressing his meaning in relation to the facts he was undertaking to state. By recurring to the testimony of Mr. Hill, given in full in the Reporter's minutes, it will be seen that the facts are few and simple, about which the dying man undertook to speak; and there is nothing in their nature that would seem to require anything more to have been said in order to get the meaning he intended to convey in respect to them. The manner and circumstances of the making of the dying declarations are proper for consideration in giving effect to them as evidence in the case—much the same as if the deposition of the dying man had been taken, and given in evidence on the trial.

II. The court charged the jury that, "if they were convinced beyond a reasonable doubt that the death of Flanders was occasioned by the shot fired by the respondent, then the prosecution had made out the killing in the manner charged in the indictment * * * that the killing is presumed to be unlawful; and when the fact of killing is established it devolves on the party who committed the act to excuse that killing; to show that it was justified, in order to escape the legal consequences which attach to the commission of the act." In this we think there is error. As to the rule of presumption, as affecting the burden of proof, as it is ordinarily found in the books on criminal law, especially the older ones, it suffices to refer to the remarks of Ch. J. REDFIELD in *State* v. *McDonnell*, 32 Vt. 538–9. Yet, with reference to that rule, as it was applied in the present case, the statement of it in Foster's Cr. Law 225, is worthy of notice. "In every charge of murder, the fact of

killing being first proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, *unless they arise out of the evidence adduced against him;* for the law presumeth the fact to have been founded in malice, until the contrary appeareth." In Roscoe, p. 20, that quotation is preceded by this statement, viz: "When a man commits an unlawful act, *unaccompanied by any circumstances justifying its commission*, it is a presumption of law that he acted advisedly, and with the intent to produce the consequences which have ensued." In *Yorke's Case*, 9 Met. 91, the meaning of the rule is peculiarly indicated by the manner in which Ch. J. SHAW stated it: "that when the killing is proved to have been committed by the defendant, *and nothing further is shown*, the presumption of law is that it was malicious, and an act of murder;" that meaning is made palpable and is illustrated by the same great judge in *Hawkins's Case*, 3 Gray 465, in which he says "that this was inapplicable to this (Hawkins's) case, where the circumstances attending the homicide were fully shown by the evidence." And on this point he instructed the jury that "the murder charged must be proved; the burden of proof is on the commonwealth to prove the case; all the evidence on both sides, which the jury find true, is to be taken into consideration; and if, the homicide being conceded, no excuse or justification is shown, it is either murder or manslaughter; and if the jury upon all the circumstances are satisfied beyond a reasonable doubt, that it was done with malice, they will return a verdict of murder; otherwise they will find the defendant guilty of manslaughter."

In *McKie's Case*, 1 Gray 61, on an indictment for assault and battery with a dangerous weapon, the subject of the burden of proof in that class of offences, was fully considered by the court, and instructively discussed by BIGELOW, J., in the opinion of the court drawn up by him. He says: "It appears that the justification on which the defendant relied, was disclosed partly by the testimony introduced by the government, and in part by evidence offered by the defendant; and that it related to, and grew out of the transaction or *res gestæ* which constituted the alleged criminal act." The result is stated thus: "But in cases like the present, * * * where the defendant sets up no separate independent fact in answer to the criminal charge, but confines his defence to the original transaction charged as criminal, with its accompanying circumstances, the burden of proof does not change, but remains upon the government to satisfy the jury that the act was unjustifiable and unlawful." Preceding this extract it is said, "Even in the case of homicide, where a stricter rule has been held as to the burden of proof than in other criminal cases, upon peculiar reasons applicable to that offence alone, it is conceded that the burden is not shifted by proof of a voluntary killing, when there is excuse or justification apparent on the proof offered in support of the prosecution, or arising out of the circumstances attending the homicide." Citing *York's Case, supra*, and *Webster's Case*, 5 Cush. 305.

We adopt the views thus shown, in their application to the present case, so far as to hold that with reference to the state of the evidence given on the trial, the jury should not have been instructed as they were in the parts of the charges above recited; but should have been instructed in substance that upon all the evidence they must find beyond

a reasonable doubt that the crime charged in the indictment was committed by the respondent, in order to warrant his being found guilty, with proper adaptations of the instruction to this feature of the case as presented in the course and manner of the trial.

III. The exception to the communication of the presiding judge with the jury is maintained. The prevailing idea in this state has been that all communications between judge and jury after a case has been submitted to the jury, and while they have it in consideration, should be in open court, and, so far as we know, the practice has been conformable to this idea. In *Sargent* v. *Roberts et al.*, 1 Pick. 242, Ch. J. PARKER says: "We are all of opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and jury, after the cause has been committed to them by the charge of the judge, unless in open court, and when practicable, in presence of the counsel in the cause." See *Taylor* v. *Betsford*, 13 Johns. 487. As to furnishing the jury with a copy of the statutes, we regard the rule to be equally distinct and decisive, not only in this state but elsewhere: *Burrows* v. *Unwin*, 3 Car. & P. 310. In *Merrill* v. *Nary*, 10 Allen 416, a copy of the statutes was carried to the jury at their request and with the consent of the judge. This was held to be improper; and the proper views applicable to the subject are so amply set forth in the opinion delivered by Ch. J. BIGELOW, as to render it needless to do more than refer to that opinion.

IV. It is not deemed needful for the purposes of this case, with reference to its future prosecution, to discuss specifically any other subject, except that of the dwelling-house being one's castle, as bearing on his right to kill, or to use deadly weapons in defence of it. This is presented in the third request for a charge in behalf of the respondent which is in the language used by HOLROYD, J., in charging the jury in *Meade's Case* (*infra*), viz., that "the making of an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle." The purpose of this request seems to have been to justify the killing with a gun as a lawful mode and means of defending the *castle*, as well as the person within it. Looking at the state of the evidence, it is not altogether obvious what there was in the case to warrant its being claimed that the respondent killed Flanders as a means of defending himself or his castle. It was claimed in behalf of the prosecution, and the evidence in that behalf tended to show that the gun was not fired at Flanders as a measure of force to repel and prevent him from breaking into the house. Moreover, in the exceptions it is said: "The respondent testified that he fired to the ground, and the object in firing was not to hit them, but to scare them away." The respondent seems not to have regarded it as a case or a conjuncture in which it was needful or expedient to use a deadly weapon as a means of forceful resistance to meet and repel an assault on his house—whatever such assault in fact was—or to protect himself from any threatened or feared assault on his person. The gun loaded with powder alone would have served all the needs of the occasion, and of the exigency which he supposed then to exist and to press upon him. Nevertheless the point was made by said third request. It is indicated in the charge that the case, *State* v. *Hooker*, 17 Vt. 670, was invoked in support of it, and it is cited in this court

for the same purpose. That case professes to decide only the question involved in and presented by it, viz., whether it was criminal, under the statute, for the respondent to resist an officer in the service of civil process within his dwelling-house—such officer having unlawfully broken into the house for the purpose of making such service. The language of the opinion is to be interpreted with reference to the case and the question. That case, in no respect involved the subject of the use of a deadly weapon with fatal effect in defence of the castle; and it is not to be supposed that the judge who drew up the opinion was undertaking to discuss or propound the law of that subject.

To come, then, to the subject as it is involved in said third request: In Foster's Crown Law 319, it is said: "The books say that a man's house is his castle for safety and repose to himself and family." In *Cook's Case*, Cro. Car. 537, an officer, with a *capias ad satisfaciendum*, went with other officers for the purpose of executing the same, to the dwelling-house of the respondent, and, finding him within, demanded of him to open the door and suffer them to enter. He commanded them to depart, telling them they should not enter. Thereupon they broke a window, and afterwards went to the door of the house and offered to force it open, and broke one of the hinges. Whereupon Cook discharged his musket at the deceased and hit him, and he died of the wound. "After argument at the bar, all the justices, *seriatim*, delivered their opinions that it was not murder but manslaughter; the bailiff was slain in doing an unlawful act in seeking to break open the house to execute process for a subject; and every one is to defend his own house. Yet they all held it was manslaughter; for he might have resisted him without killing him, and when he saw and shot voluntarily at him it was manslaughter." This was one of the earliest cases, and was fully considered, and it has been cited in all the books on criminal law since its decision in 1640, 15 Car. 1, with some incorrectness of statement in 1 Hale's Pl. Cr. 458, and in other books adopting his text. This is in some measure rectified by a remark in 1 East's P. C. 321, 322. See also Roscoe's Cr. Ev. 758; also 1 Bishop's Cr. L. note 2, § 858, 5th ed.

It is to be specially noticed that, what made it manslaughter was, that, in order to defend his castle, it was not necessary to kill the bailiff.

The same idea of *necessity*, in order to relieve the killing from being manslaughter, exists in the case of defending one's person, as stated in Hawkins' P. C. 113. "Homicide *se defendendo* seems to be where one who has no other possible means of preserving his life from one who combats him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity." In a learned note in 2 Arch. Cr. L. 225, it is said, "But when it is said that a man may rightfully use as much force as is necessary for the protection of his person and property, it should be recollected that this rule is subject to this most important modification; that he shall not, except in extreme cases, endanger human life or great bodily harm. * * * You can only kill to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. It is therefore clear, that, if one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not

otherwise be prevented, he is guilty of murder. If, indeed, he had at first used moderate force, and this had been returned with such violence that his own life was endangered, and then he had killed from necessity, it would have been excusable homicide. Not because he could take life to save his property, but he might take the life of the assailant to save his own."

Harcourt's Case, 5 Eliz. stated in 1 Hale's P. C. 485-6, shows that this doctrine is not new. "Harcourt being in possession of a house by title, as it seems, A. endeavored to enter, and shot an arrow at them within the house; and Harcourt from within shot an arrow at those that would have entered, and killed one of the company, this was ruled manslaughter, and it was not *se defendendo*, because there was no danger of his life from them without." What was thus ruled is the key to the author's meaning in the next following paragraph of his book, which see.

The idea that is embodied in the expression, that a man's house is his castle, is not that it is his *property*, and, as such, he has the right to defend and protect it by other and more extreme means than he might lawfully use to defend and protect his shop, his office or his barn. The sense in which the house has a peculiar immunity is, that it is sacred for the protection of his person and of his family. An assault on the house can be regarded as an assault on the person, only in case the purpose of such assault be injury to the person of the occupant or members of his family, and to accomplish this, the assailant attacks the castle in order to reach the inmate. In this view it is said and settled, that, in such case, the inmate need not flee from his house, in order to escape from being injured by the assailant, but he may meet him at the threshold, and prevent him from breaking in by any means rendered necessary by the exigency; and upon the same ground and reason as one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant if rendered necessary by the exigency of the assault.

This is the meaning of what was said by HOLROYD, J., in charging the jury in *Meade's Case*, 1 Lewin C. C. 184. Some exasperated sailors had ducked Meade, and were in the act of throwing him into the sea, when he was rescued by the police. As the gang were leaving, they threatened that they would come by night and pull his house down. In the middle of the night a great number came, making menacing demonstrations. Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Meade was indicted for murder. Upon that state of facts and evidence, the judge said to the jury: "A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger, &c. * * * But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling-house, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and, therefore, in the eye of the law it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return, &c. * * * There are cases where a person in heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter, as where a party coming

up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. In the present case, if you are of opinion that the prisoner was really attacked, and that the party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he perhaps was justified in firing as he did; if you are of opinion that he intended to fire over and frighten, then the case is one of manslaughter, and not of self-defence."

The sense in which one's house is his castle, and he may defend himself within it, is shown by what is said in 1 Hale's Pl. Cr. 486, that, "in case he is assaulted in his own house, he need not flee as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight."

Now set over against this what is said in 1 Russell 662, and the true distinction between the house as *property*, on the one hand, and as *castle* for protection, on the other, is very palpable, viz.: "If A., in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of life." P. 663. "But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of a dangerous or deadly weapon; more particularly if such violence is used after the party has desisted from the trespass." In *Carrol* v. *The State*, 24 Ala. 36, it is said, "the owner may resist the entry into his house, but he has no right to kill, unless it be rendered necessary in order to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm." Cited in 2 Bishop Cr. L. § 707, 5th ed. That case impresses us differently from what it does the learned author, as indicated by his remark prefacing the citation.

As developing and illustrating the prevailing idea of the law as to what will justify homicide *se et sua defendendo*, it is not without interest upon the point now under consideration to advert to what is said upon the general subject. In McNally 562, it is said, "the injured party may repel force by force, in defence of his person, habitation, property, against one who manifestly intendeth and endeavoreth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he findeth himself out of danger, and if, in such conflict, he happeneth to kill, such killing is justifiable." Wharton incorporates this into his work as text. The same is found in the older books: 1 Hale's Pl. Cr. 485–6; also in Foster's Crown Law 273, 1 Russell 667, and in other books *ad lib.* But to apprehend this in its true scope and application, it is important to have in mind what is said in 1 Russell 668: "The rule clearly extends only to cases of felony: for if one come to beat another, or take his goods merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet, if he kill him, it is manslaughter." * * * No assault however violent will *justify* killing the assailant, under a plea of necessity, unless there be a manifestation of felonious intent." See Archbold Cr. L. 221, cited 9 C. & P. 22.

This covers the cases of statutory justification of homicide, both under

our own and the English statutes; and in principle, and in reason, it is in keeping with the common law as to *se defendendo;* in defining the scope of which, in this respect, it is well laid down that, "before a person can avail himself of the defence, that he used a weapon in defence of his life, it must appear that that defence was necessary to protect his own life, or to protect himself from such serious bodily harm as would give him reasonable apprehension that his life was in immediate danger:" 1 Russell 661.

The law of the subject, as given in the books thus cited and referred to, seems to have been adequately apprehended by the court, and, so far as we can judge from what is shown by the record before us, it was not administered erroneously or improperly in the trial as against the respondent. If it were to be assumed that the defence might legitimately claim that there was an assault on the house, with the intent either of taking the life of the respondent or doing to him great bodily harm, the respondent would be justified in using a deadly weapon, if it should be necessary in order to prevent the perpetration of such crime, or if, under existing circumstances attending the emergency, the respondent had reason to believe, and was warranted in believing, and in fact did believe, that it was necessary, in order to prevent the commission of such crime. In case the purpose of the assailant was to take life, or to inflict great bodily harm, and the object of his attack (if there was such attack), upon the house was to get access to the inmate occupying the same, for such purpose, the same means might lawfully be used to prevent him from breaking in, as might be used to prevent him from making the harmful assault upon the person, in case the parties were met face to face in any other place. In either case the point of justification is, that such use of fatal means was necessary in order to the rightful effectual protection of the respondent, or his family, from the threatened or impending peril.

We have been led to this discussion and exposition of the law as to the defence of the dwelling-house, on account of the somewhat fragmentary and disjointed condition in which it is done up in the books and cases of criminal law, and for the purpose of rendering as explicit as we are able the views of this court on that subject, as it has been brought into question and debate in the case in hand.

In this exposition, and in the views embodied in this opinion, all the members of the court concur.

The verdict is set aside and new trial granted.

We have no purpose of attempting to enlarge upon the legal discussion in the foregoing opinion, which seems to us altogether satisfactory, and will commend itself to the acceptance of the profession, as stating many nice and sometimes embarrassing questions, with great clearness and truth. There are one or two matters connected with the general taste of the times, affecting these questions, that we shall venture to advert to. The demand of the jury for further instructions by way of correspondence and the opportunity to discuss the statutes in their consultation-room, is something akin to many other things which have crept into jury trials with telegraphs and high schools and competitive examinations. It seems to be supposed by some, that those jurors, who come into the seats with their kid gloves on, and who occupy themselves, during the trial, in taking notes of the testimony, have made jury trials quite another thing from

what they were under the old regime; and this is, no doubt, true, but the difference is against, rather than in favor of their efficiency. The old-fashioned sturdy yeomanry of the county, who, forty years since, made up the panel of petit juries, in the rural districts, and some of whom still linger, were a much better material for jurors than the modern graduates of the high schools. And these men never entered upon any new study of the law in their consultation-rooms. The decision upon this point was eminently proper. A jury is no more competent to fix the proper construction of statutes, at their consultation-rooms, than they are to determine a nice question of constitutional law. But some of the modern jurors hold themselves entirely competent for both. If jury trials continue to be improved for a few years more, as they have been of late, by the infusion of greater intelligence, shown from the study of algebra and botany, we think it may not be difficult to find a majority in favor of abolishing them. But it will, in our judgment, be an evil day for the country, when either grand or petit juries become too far debased to be longer endured.

There is another evil in this country becoming quite too rife for quiet and good order, *i. e.*, parties taking the law in their own hands from an intuitive knowledge of what it is. The respondent in this case, from the advice of some law student, just out of college, or from reading for himself the history of Kenilworth or of Guy of Warwick, appears to have come to the very sage conclusion, that as a dwelling-house was the owner's castle, he might defend it in the same mode as the barons of the middle ages did. I. F. R.

ABSTRACTS OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF INDIANA.[1]

SUPREME JUDICIAL COURT OF MAINE.[2]

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE.[3]

SUPREME COURT OF NEW YORK.[4]

Accord and Satisfaction.

The payment in money, of part of a debt concededly due, which is agreed to be taken in full payment, is not an accord and satisfaction. But when the existence of the debt, or the amount of it is disputed, and a sum of money less than the amount claimed is received in full payment, it is an accord and satisfaction: *Howard et al.* v. *Norton*, 65 Barb.

So, too, when the note of a third person, for less than the debt, or property other than money is received in satisfaction of the debt, it is an accord and satisfaction, and bars a recovery for any part of the resi-

[1] From J. B. Black, Esq., Reporter; to appear in 37 Ind. Rep.

[2] From Edwin B. Smith, Esq., Reporter; to appear in 60 Me. Reports.

[3] From J. M. Shirley, Esq., Reporter; to appear in 52 N. H. Rep.

[4] From Hon. O. L. Barbour; to appear in vol. 65 of his Reports.